IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEWART DICKLER, BEECH TREE RUN, INC., and WANTAGH UNION FREE SCHOOL DISTRICT, Plaintiffs	:	CIVIL ACTION
v.	:	
CIGNA PROPERTY AND CASUALTY COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY, Defendants	:	NO. 90-4288

Newcomer, J. March , 1998

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Presently before this Court are plaintiffs' Motion to Enforce Final Order Dated July 31, 1996 and defendant's response thereto. After a hearing in open court, held on March 9-10, 1998, and after consideration of the testimony of the witnesses, the admitted exhibits, and the arguments of counsel, the Court will grant said Motion consistent with the following findings of fact and conclusions of law.

I. Background

In view of the complicated and extensive procedural background of this case, which is more fully set forth in this Court's July 31, 1996 Findings of Fact and Conclusions of Law, the Court finds that a brief summary of the background of this case will suffice. At issue at this point in this protracted litigation is a charitable contribution, in the amount of $2,875,000.00, made by plaintiffs to Friends of Beth Rivkah Schools ("Beth Rivkah") and Machne Israel, Inc. ("Machne Israel")

for the building of a school in the Crown Heights section of Brooklyn, New York. For a case involving a charitable donation, it has been extremely litigious, angry, and bitter. Plaintiffs or movants at this point of the litigation are Beech Tree Run, Inc. and the executors of the estate of Lewis Kates.[1] Mr. Kates, counsel for plaintiffs, joined the litigation as a party when he contributed his attorney's fee--almost $1 million--to the building of the school. Defendant at this point is Friends of Associated Beth Rivkah Schools.[2]

The parties--different parties at different points--have been litigating this case since 1990, and the case has undergone various stages and transformations. Relevant to the present dispute is an agreement called the Proceeds Stipulation which was entered into by the present parties on June 23, 1993. This Court approved the Stipulation and made it an enforceable Order of the Court on June 24, 1993. The Third Circuit approved it by Order dated July 2, 1993. The Proceeds Stipulation provides that $2,875,000.00 is to be paid by plaintiffs for the sole purpose of completing the construction of a certain school building in Crown Heights, Brooklyn, New York; that the school is

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1. Mr. Kates passed away on January 11, 1998 while the instant Motion was pending before this Court.

2. The original defendants, insurance companies, are no longer parties to this action. For whatever reason, the caption to this action has never been properly changed. Also, Machne Israel, Inc., a party at the hearing previously held before this Court on plaintiffs' Motion to Enforce, is apparently represented by Beth Rivka.

to be named and known as the “Dr. Abraham and Pauline Kates and Dr. Edward Wasserman Building”; and that the school shall be completed, so named, and placed in use as a school by December 31, 1995. Otherwise the gift is to lapse and the gift amount is to be repaid to plaintiffs.

When the school was not completed by the December 31, 1995 deadline, plaintiffs moved this Court to enforce the Proceeds Stipulation so that they could recover their monies. On July 31, 1996, this Court denied plaintiff’s motion and instead, as an equitable matter, modified the Proceeds Stipulation by extending the deadline for completion to May 15, 1997. The Court noted at that time that the management of the building project appeared slipshod and unsatisfactory, and further cautioned defendant to take immediate steps to ensure a timely and full completion of the project because failure to complete the project by the May 15, 1997 deadline would likely be regarded by this Court as a material breach that would warrant the repayment of the net proceeds of the gift and the payment of Lewis Kates' fee.

Plaintiffs appealed this Court’s July 31, 1996 Order modifying the Proceeds Stipulation to the Third Circuit. On August 16, 1997, the Third Circuit affirmed this Court’s decision to extend the construction deadline to May 15, 1997.

The May 15, 1997 deadline has now come and gone, and the parties are before this Court once again. Plaintiffs claim that the school is still incomplete and that therefore the Court should enforce the Proceeds Stipulation to have defendant return

plaintiffs' monies. Defendant responds quite strongly, on the other hand, that the school is finished. Faced with such diametrically opposed stances, the Court, by Order dated December 5, 1997, appointed John Rauch, EFAIA, as an independent expert to inspect the school building at issue and to report his findings to the Court. Mr. Rauch submitted his report on January 20, 1998 addressing the limited issues that are before this Court on the instant Motion: (1) whether construction of the school building at issue is complete, (2) whether such building has been placed in use as a school, and (3) whether the same school has been named the "Dr. Abraham and Pauline Kates and Dr. Edward Wasserman Building." Now, after hearing the testimony of the witnesses, the admitted exhibits, and the arguments of counsel, this Court makes the following findings of fact and conclusions of law with regard to the Motion before it.

II. Findings of Fact

1. The structure at issue in this litigation is located at 470 Lefferts Avenue in Brooklyn, New York, on the corner of Lefferts and Brooklyn Avenues. As evidenced by Mr. Rauch's report as well as several exhibits admitted into evidence, the entire structure forms an "L"-shaped building comprising two wings, the west or Lefferts Avenue wing and the south or Brooklyn Avenue wing, with a memorial/library/lobby at the crook of the "L." The main entrance to this entire structure is at the memorial/ library/lobby point.

2. It is uncontested by Beth Rivka, and the Court likewise finds, that as of May 15, 1997, no part of this structure was complete nor in use as a school nor appropriately named. The temporary Certificate of Occupancy was not issued until November 14, 1997, some six months after the modified deadline, and in fact, two weeks after the instant Motion to Enforce was filed. Before the issuance of this Certificate no part of this structure could be occupied nor placed in use under New York ordinances.

3. Starting on November 14, 1997 and continuing to the date of this hearing, the only parts of the entire structure that are certified for occupancy are the second, third, and fourth floors of the Brooklyn Avenue wing. The first and cellar levels of this same wing, which contain a two-story high auditorium/cafeteria, are not yet certified for occupancy. The auditorium/cafeteria (first and cellar floors), as well as the subcellar, are incomplete and are not able to be lawfully occupied or placed in use. The same is true for the rest of the structure which by admission of Beth Rivka, and as established by the testimony and exhibits, is incomplete and not in use. The report as well as the in-court testimony of Mr. Rauch also confirm that the building is not complete unless the term “school building” is defined as the second, third, and fourth floors only of the Brooklyn Avenue wing.

4. Beth Rivka now claims that these three floors of one wing of the structure--floors two through four of the

Brooklyn Avenue wing--constitute the "school building" referred to in the Proceeds Stipulation which is supposed to be named the "Dr. Abraham and Pauline Kates and Dr. Edward Wasserman Building" (hereinafter "Kates Wasserman Building").

5. Although in his report Mr. Rauch labeled the two wings respectively the "school wing" and the "day care wing," testimony elicited at the hearing, as well as the architectural plans, show that classrooms are to be installed in the top two floors of the "day care" or Lefferts Avenue wing as well.

6. The testimony of Eli Laine, the manager and supervisor of the entire building project, was particularly damaging to the credibility of Beth Rivka's argument that three floors of one wing of the entire structure constitute the Kates Wasserman Building. After testifying that there <u>is</u> a Kates Wasserman Building, Mr. Laine painfully equivocated between saying that the auditorium--which is unfinished--was <u>in</u> the Kates Wasserman Building, and then finally stating that he <u>did not know</u> whether the auditorium was part of the Kates Wasserman Building.

7. In an affidavit submitted to this Court prior to the hearing, Mr. Laine stated that the school building was complete. He further stated that he was attaching photographs of the self-same school building. Among these photographs are pictures that prominently depict the auditorium--the same auditorium which at the time of the making of the affidavit was a part of the school building, but as to which, at the time of the

hearing, Mr. Laine claimed no knowledge as to whether it was part of the school building.

8. A temporary sign put up before the 1996 hearing before this Court reads as follows: “Upon completion this building will be dedicated to Dr. Abraham & Pauline Kates & Dr. Edward Wasserman.” This sign was put up outside of the Lefferts Avenue wing of the structure--the wing that Beth Rivka now claims is not part of the Kates Wasserman Building.

9. The testimony from the 1996 hearing is at best ambivalent with regard to Beth Rivka’s argument, and more probably damaging. At no time at the 1996 hearing did Beth Rivka represent to the Court that only the Brooklyn Avenue wing, much less only three floors of the Brooklyn Avenue wing, constituted the “school building.” Both sides may now go back to the transcripts from that hearing and interpret various testimonies differently, but the Court draws a strong negative inference from the fact that Beth Rivka, at no time in the previous hearing, represented to the Court unequivocally and succinctly that the Kates Wasserman Building was only one wing of the structure or only three floors of one wing of the structure at issue. Given that nearly the same issues, in particular the completion of the construction of the school, were before the Court, the Court finds ample justification in drawing a negative inference from the fact that Beth Rivka raises this argument for the first time now.

10. The application for the Certificate of Occupancy does not distinguish between one wing or the other. Although the architect on this project, Felix Tambasco, testified that this application was for the south or Brooklyn Avenue wing only, the application itself, in particular the maximum capacity statements, demonstrate that no distinction was drawn between the separate wings.

11. The standard AIA contract between the builder and the owner does not distinguish between these alleged separate components of the structure. The entire structure is referred to as the "Work."

12. New York will not issue a permanent Certificate of Occupancy until the entire "L"-shaped structure is complete.

13. The Court concludes and finds as fact that the "school building" referred to by the parties in the Proceeds Stipulation is the entire "L"-shaped structure located at 470 Lefferts Avenue, and not just one wing of that structure, and certainly not three floors of one wing of that structure.

14. Classes are currently held on the second, third, and fourth floors of one wing of the structure, the Brooklyn Avenue wing. About six to seven hundred girls, grades four through eight, attend classes taught by teachers and in general engage in the discipline of learning. Although as of the May 15, 1997 deadline no part of the structure was in use as a school, as of the date of this hearing, the Court is satisfied and finds

that these three floors of the Brooklyn Avenue wing are complete and have been placed in use as a school.

15. Although as of the May 15, 1997 deadline, no part of the structure at issue was appropriately named in a permanent manner as clearly and unequivocally purposed in the Proceeds Stipulation, as of the date of the hearing, the Court finds that the entrance to the Brooklyn Avenue wing bears the appropriate name of "Dr. Abraham and Pauline Kates and Dr. Edward Wasserman Building" and that the name is affixed in a permanent manner. However, the school building at issue has not been appropriately named because the permanent sign has been affixed to the Brooklyn Avenue entrance and not the main entrance of the entire school as purposed by the parties to the Proceeds Stipulation.

16. The intent of Lewis Kates in giving up his attorney's fee for the building of the Kates Wasserman Building and making such gift contingent upon certain conditions was undoubtedly as mixed as the motives behind any human act. The Court finds that among whatever motives Mr. Kates may have had were the desire to leave behind a legacy as well as the desire to see this legacy completed in a timely fashion within his lifetime.

17. In sum, the Court notes that the factual issues in this case are straightforward. Whether the "school building" at issue is construed to be the entire "L"-shaped structure, for which there is ample evidence, or only the Brooklyn Avenue wing, that building is not complete. The only complete and in use

portions are the second, third, and fourth floors of the Brooklyn Avenue wing, and it tests the patience of this Court that a party could argue that the "school building" referred to in the Proceeds Stipulation is three floors of one wing of a building. To repeat, the Court finds that the "school building" referred to in the Proceeds Stipulation is the entire "L"-shaped structure located at 470 Lefferts Avenue in Brooklyn, New York.

III. Conclusions of Law

Beth Rivka's Plain Language Argument

1. Beth Rivka contends that under the clear and plain language of the proceeds stipulation, repayment is required only if Beth Rivka failed to do both of the following: (1) recommence construction by June 1, 1994 and (2) complete construction by, as modified, May 15, 1997. Beth Rivka argues that both conditions must fail before repayment is required, and that construction did recommence by June 1, 1994.

2. To the knowledge of this Court, this is the first time Beth Rivka has raised such a defense. The Court finds the argument to be without merit and refuses to read the Proceeds Stipulation so counterintuitively. As this Court reads the relevant portion of the Stipulation, the manifest intention of the parties was that "[s]hould construction of the said school not be recommenced on or before June 1, 1994 and not be completed, so named and placed in use as a school by [May 15, 1997], this gift shall lapse." Clearly the parties intended that all these conditions--the recommence date, as well as the

completion, named, and placed-in-use date--be met. Beth Rivka's reading is contorted and even disingenuous. The Court rejects this argument.

Beth Rivka's Substantial Performance Argument

3. Beth Rivka next contends, as it did back at the 1996 hearing on the same Motion, that plaintiffs are not entitled to the relief they seek because there has been no material breach of the Proceeds Stipulation. According to Beth Rivka there has been no material breach because it has substantially performed under the terms of the Proceeds Stipulation and/or because time is not of the essence under the Proceeds Stipulation.

4. The substantial performance doctrine is available to those who competently perform in all material respects. Fort Washington Resources, Inc. v. Tannen, 901 F. Supp. 932, 940 (E.D. Pa. 1995). The test for applying the doctrine depends on whether the breach of the defaulting party is material, that is, whether the breach goes to the essence of the contract. In re Stein, 57 B.R. 1016, 1021 (E.D. Pa. 1986). In determining whether a breach is material, the following factors should be considered:

> (a) the extent to which the injured party will obtain a substantial benefit which he could have reasonably anticipated;
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> (b) the extent to which the injured party may be adequately compensated in damages for lack of complete performance;
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> (c) the extent to which the party failing to perform has already partly performed;

> (d) the greater or less hardship on the party failing to perform in terminating the contract;
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> (e) the willful, negligent or innocent behavior of the party failing to perform.

Id.

5. "Time is not of the essence in a contract unless it is specifically so provided or unless the circumstances clearly indicate that it was the intent of the parties." Bogojavlensky v. Logan, 181 Pa. Super. 312, 318, 124 A.2d 412 (1956). "[W]here time is not of the essence, the mere failure to perform on the date mentioned in a contract is not per se a breach which wholly destroys the contract." Bert v. Silverstein, 224 Pa. Super. 489, 306 A.2d 910, 911 (1973). Rather, where time is not of the essence, the contract becomes one in which performance must be within a reasonable time. Bogojavlensky, 181 Pa. Super. at 318.

6. Beth Rivka has not substantially performed. As this Court has found that the “school building” referred to in the Proceeds Stipulation contemplated the entire “L”-shaped structure, and as only three floors of one wing of this building is complete and in use and named, performance cannot be said to be substantial, not by any stretch of the imagination. Likewise, the time-is-of-the-essence doctrine does not apply as performance is nowhere near complete.

Furthermore, the injured party, in particular Lewis Kates, did not receive the benefit he at least in part desired--to see the completion of this school in his lifetime and to know

that this school was part of his legacy. Also, there is no other monetary means of adequately compensating the injured party. And finally, the Court finds that Beth Rivka's failure to perform cannot be deemed innocent in light of the ample warning this Court gave Beth Rivka at the previous hearing at which this Court equitably modified the deadline for completion. Thus this argument is also rejected.

Beth Rivka's Equity Argument

7. Finally, as it successfully did at the 1996 hearing before this Court, Beth Rivka once again argues that the Proceeds Stipulation is no longer equitable and that, therefore, this Court should not enforce the Stipulation against Beth Rivka. Beth Rivka's arguments are identical to those offered back in 1996 when this Court agreed with Beth Rivka and modified the Proceeds Stipulation using its powers in equity.

8. As affirmed by the Third Circuit, the Proceeds Stipulation is the functional equivalent of a consent decree. See Washington Hosp. v. White, 889 F.2d 1294, 1299 n.9 (3d Cir. 1989).

9. The modification of consent decrees is governed by Federal Rule of Civil Procedure 60(b)(5) ("Rule 60(b)(5)"). See, Bldg. and Constr. Trades Council of Philadelphia and Vicinity v. Nat'l Labor Relations Bd., 64 F.3d 880, 888 (3d Cir. 1995).

10. Rule 60(b)(5) provides, in relevant part, as follows: "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or

proceeding . . . [if] it is no longer equitable that the judgment should have prospective application."

11. The Third Circuit Court of Appeals recently has set forth, in Bldg. and Constr. Trades Council of Philadelphia and Vicinity v. Nat'l Labor Relations Bd., 64 F.3d 880, 888 (3d Cir. 1995), a number of factors which should be considered in determining whether a decree, entered by consent or otherwise, is "no longer equitable." See, Rule 60(b)(5).

12. In Bldg. and Constr. Trades Council, 64 F.3d at 888, the Third Circuit states, in relevant part, as follows:

> We believe that the generally applicable rule for modifying a previously issued judgment is that set forth in Rule 60(b)(5), i.e., 'that it is no longer equitable that the judgment should have prospective application.'. . A court of equity cannot rely on a simple formula but must evaluate a number of potentially competing considerations to determine whether to modify or vacate an injunction entered by consent or otherwise.
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> We abjure establishing a rigid, pervasively applicable rule, although it may be helpful to set forth the factors that generally should be considered in deciding whether to modify an injunction. . . Central to the court's consideration will be whether the modification is sought because changed conditions unforeseen by the parties have made compliance substantially more onerous or have made the decree unworkable. . . .
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> . . . [T]he court must balance the hardship to the party subject to the injunction against the benefits to be obtained from maintaining the injunction. . . Finally, the court should determine whether the objective of the decree has been achieved and whether continued enforcement would be detrimental to the public interest. . . It follows that the interest in finality of judgments may assume greater or lesser prominence according to the nature of the case and the private and public interests implicated, but should not be either deprecated or ignored.

13. Application of these factors back in 1996 led to the conclusion that the Proceeds Stipulation should be modified. Today the application of the same factors leads to different conclusions. First, with regard to any "changed conditions unforeseen by the parties," the Court notes that although it strictly limited the parties with regard to the issues to be presented at the hearing, these issues were delineated by Beth Rivka itself in its response to the plaintiffs' Motion to Enforce. Beth Rivka unequivocally represented that the school was complete, and even were the Court to understand "school building" to mean only the Brooklyn Avenue wing, Beth Rivka included photographs of the auditorium which uncontested testimony at the hearing revealed to be incomplete. Thus, there being no "changed conditions" averred by Beth Rivka, this factor weighs against it.

14. The second factor, "balanc[ing] the hardship to the party subject to the [consent decree] against the benefits to be obtained from maintaining the [consent decree,]" is a difficult one for the Court. To require Beth Rivka to repay the net proceeds of the gift and to pay Lewis Kates' fee would undoubtedly work much hardship on the school, and in the worst case scenario force the school to close down. Previously, the Court had noted that on the other hand, the benefits to the plaintiffs were purely monetary and would inure only to them. The Court is of a different mind now. Although the benefits in a tangible sense are purely monetary, the Court finds that the

greater benefit that obtains form maintaining the consent decree is the public policy interest in maintaining the integrity of charitable donations that are made contingent upon terms that the parties have agreed to. To refuse ever to enforce a contract because it may work hardship upon the donee, is quite literally to render all such contracts null and void. The resulting damage, on a larger public scale, of such a precedent cannot be taken lightly by this Court, even when the opposing interest is the interest of school children in keeping their school. Furthermore, the Court notes that the evidence presented was far too skimpy to determine whether the school would indeed be forced to close. Beth Rivka may or may not have other assets with which to meet this obligation. In any event, the Court finds that these competing interests--the hardship to Beth Rivka as opposed to the benefit to be obtained in maintaining and enforcing this consent decree--while in close competition, favor plaintiffs if only because of the flagrant failure of defendant to even try to honor a charitable contract that it had entered into. Such flagrant behavior--the second time around--cannot be countenanced by this Court in light of the public policy implications in this case.

15. Finally, the last factor is whether “the objective of the decree has been achieved and whether continued enforcement would be detrimental to the public interest." The Court, in good conscience, cannot find that the objective of the decree has been achieved. As the findings of fact show, the decree at issue in

this case anticipated completion of the entire “L”-shaped building by a certain date, as well as that this building be placed in use as a school and named appropriately. None of these conditions were met by the modified deadline of May 15, 1997. And even today, only three floors of one wing of the building are complete and in use as a school. One of the donors, Lewis Kates, died before the anticipated benefit of a legacy had accrued. The school was not completed in a timely manner as purposed by the decree and in fact is still incomplete. The objective of the decree has not been achieved.

With regard to whether continued enforcement would be detrimental to the public interest, the Court finds that, as previously stated, while requiring Beth Rivka to repay the net proceeds of the gift and to pay Lewis Kates' fee could be detrimental to the interests of the school and the school children, of equal if not greater import is the detriment to the public interest of refusing to honor the contractual conditions of charitable givers. In light of the ample warning given by this Court to Beth Rivka at the last hearing--in which the Court cautioned defendant to take immediate steps to ensure a timely and full completion of the project because failure to complete the project by May 15, 1997 would likely be regarded by this Court as a material breach that would warrant the repayment of the net proceeds of the gift and the payment of Lewis Kates' fee--the Court concludes that enforcement of the decree will, overall, not be detrimental to the public interest, but will in

fact further the public interest of encouraging and honoring charitable gifts.

16. In light of these factors, the Court concludes that equity demands that the Proceeds Stipulations be enforced.

IV. Conclusion

In concluding, the Court notes that this matter has presented hard questions which, as stated previously, brought to bear two competing interests. One is the interest of the students at the Beth Rivka school, as well as the surrounding community, in ensuring that this school will continue to be available to serve the needs of these children. The other is the interest of charitable donors who give generously expecting that their contractual conditions--once agreed to--will be enforced by courts. The case before the Court has been complicated by the enduring animosity between the parties as well as unprofessional, perhaps even unethical, behavior by different parties at different times. In attempting to see through the cloud of such distasteful matters and to adjudicate the issues before this Court fairly and objectively, the Court in 1996 determined that--despite what appeared to be slipshod and unsatisfactory performance on the part of Beth Rivka in managing the building project--equity called for an extension giving Beth Rivka a chance to vindicate the interests of the school children who were to benefit from this charitable gift, and to honor the conditions of the contract that had allowed the donation to be made in the first place. Now, at this juncture, the Court, albeit with some

reluctance, determines that Beth Rivka has had and lost its chance. Equity now demands that the contract be enforced and that the rights of the charitable givers no longer be ignored. Accordingly, the Court will grant the plaintiffs' Motion to Enforce.

An appropriate Order follows.

Clarence C. Newcomer, J.

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STEWART DICKLER, BEECH TREE RUN, INC., and WANTAGH UNION FREE SCHOOL DISTRICT, Plaintiffs	:	CIVIL ACTION
v.	:	
CIGNA PROPERTY AND CASUALTY COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY, Defendants	:	NO. 90-4288

O R D E R

AND NOW, this day of March, 1998, upon consideration of the Motion to Enforce Final Order Dated July 31, 1996, the response thereto, and consistent with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that said Motion is GRANTED. It is further ORDERED that, in keeping with the conditions and terms of the Proceeds Stipulation, the Friends of Associated Beth Rivka Schools shall REPAY to Beech Tree Run, Inc. the amount of $1,877,500.00. It is further ORDERED that, in keeping with the conditions and terms of the Proceeds Stipulation, the Friends of Associated Beth Rivka Schools shall PAY to the executors of the estate of Lewis Kates and to Lewis Kates Law Offices the sum of $997,500.00 plus interest on this sum computed at 6% per annum starting from July 1, 1993 to the date of payment.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.